distributed a variety of literature of a pacifist and socialist nature in this connection.

Petitioner summarized his opposition to war in a statement to his draft board as follows: "For the sake of humanity and out of deep loyalty to my fellow citizens I am opposed to war and refuse to participate in any activity connected with the war effort. However, I seek to continue working in the fields of constructive effort, alleviating distress among the underprivileged members of society, assist in breaking down the barriers of race, color, and creed, and work towards a society based on social ownership and co-operative and genuinely democratic control of the means of production and distribution for the benefit of all mankind."

The petitioner stated that he belonged to no church, but was reared in a Jewish family by religious parents. He summarized his religious views in terms of the Golden Rule and said that he had spent much time in alleviating suffering of the poor and distressed, particularly farmers and sharecroppers, by distributing clothing, books and other necessities, which he solicited by personal appeals and door to door canvassing. He also stated that his social views, which he described as socialism, were his religious views.

Witnesses interviewed by the Federal Bureau of Investigation and others who testified before the hearing officer were unanimous in ascribing the petitioner's opposition to war to his passion for social justice, which some of the witnesses regarded as a religious belief. The sincerity of these views was never seriously questioned.

The local draft board which considered the statements filed with it rejected petitioner's claim of conscientious objection and classified him in Class 1A as available for

military service (S. R.). From this classification he appealed on January 25, 1943 and the appeal was referred to the hearing officer, Mr. Hartke, who received the further evidence mentioned above. The hearing officer determined that the petitioner's views were not religious in character and recommended that he be classified 1A (S. R.). This recommendation was concurred in by the Department of Justice, as shown in a letter dated May 7, 1943, addressed to the appeal board (S. R.). The chairman of the appeal board testified (R. 22-27) that his board had considered the report of the hearing officer and other evidence in the petitioner's draft file (now set forth in the Supplemental Record) and had before it no other evidence. The witness could not, however, recall the case, stating that many hundreds of such cases were before the board, and gave no indication of the basis upon which the appeal board's decision was made, other than stating that all the evidence in the file was considered.

The decision by the appeal board was the final administrative action in the case. The petitioner requested that a Presidential appeal be taken in his behalf by the Director of Selective Service (S. R.) but this request was denied and the decision of the appeal board was allowed to stand (S. R.). Subsequently the petitioner was ordered to report for induction on October 18, 1944 (R. 16). He went to the induction station and passed the physical examination but refused to take the oath of induction (R. 16). As stipulated on the trial, he complied with all orders and took all steps up to the point of taking the oath of induction (R. 16). For his refusal to submit to induction he was indicted, pleaded not guilty, and after a trial before a jury was convicted and sentenced to imprisonment for 3½ years (R. 7).

The petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 8) on the grounds urged here as justifying review by this court.

Reasons for Allowance of Writ

The American Civil Liberties Union urges this court to grant the petition and allow the writ for the reasons set forth below:

I

Conflict between the decision below and decisions of the Circuit Court of Appeals for the Second Circuit.

The court below construed the requirement of "religious training and belief" for exemption of a conscientious objector (§5(g) Selective Training and Service Act of 1940, 50 U. S. C. App. 305(g)) as follows:

> "It is our opinion that the expression 'by reason of religious training and belief' is plain language, and was written into the statute for the specific purpose of distinguishing between a conscientious social belief, or a sincere devotion to a high moralistic philosophy, and one based upon an individual's belief in his responsibility to an authority higher and beyond any worldly one." (R. 44)
>
> "No matter how pure and admirable (the appellant's) standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion." (R. 46)

An exactly contrary construction was adopted in the Circuit Court of Appeals for the Second Circuit in *U. S.* v. *Kauten,* 133 Fed. 2d 703, 708, in which the court said:

"The provisions of the present statute * * * take into account the characteristics of a skeptical generation and make the existence of a conscientious scruple against war in any form, rather than allegiance to a definite religious group or creed, the basis of exemption. * * * A compelling voice of conscience * * * we should regard as a religious impulse. * * *

It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellowmen and to his universe—a sense common to men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.

* * * * *

There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. The latter, and not the former, may be the basis of exemption under the Act. The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."

The foregoing was not necessary to the decision in the *Kauten* case, but the court held to the same effect in *U. S.*

ex rel. Phillips v. *Downer,* 135 Fed. 2d 521 and *U. S. ex rel. Reel* v. *Badt,* 141 Fed. 2d 845. The decisions in the Ninth Circuit and in the Second Circuit are thus squarely in conflict, the former holding that a conscientious objector cannot be "religious" within the meaning of the statute unless he accepts the concept of a deity, while the latter holds that one may be religious without any formal belief in a god.

II

Conflict in decisions and policies of Selective Service agencies.

Even more important than the conflict between the decisions of the Second Circuit and the Ninth Circuit on this question is the similar conflict which prevails among draft boards and Selective Service officials. This conflict was commented upon by the Director of Selective Service in his second annual report, "Selective Service in War Time" (United States Government Printing Office 1943) where it is stated (p. 258):

> "The appeals of conscientious objectors have presented some of the most troublesome as well as the most interesting questions. Here divergent ideas broke sharply over that rock of contention presented by the congressional language 'religious training and belief.' • • •
>
> Hearing officers of the Department of Justice • • • held generally that the conviction, while limited to no particular creed, must nevertheless rest upon an easily recognizable religious background with the definition of religion the usual somewhat formal concept."

While the foregoing is the only official document which reflects the conflict among Selective Service officials in the construction of the phrase "religious training and belief", an examination of decisions by draft boards and by hearing officers of the Department of Justice will show that the phrase "religious training and belief" has been construed in a variety of ways, and there has never been any uniformity on the subject except to the extent that the decisions of the Circuit Court of Appeals for the Second Circuit have been followed by some officials.

The first Director of Selective Service, Clarence B. Dykstra issued a memorandum in December 1940 giving this interpretation:

> "Religious training or discipline may be considered as having been received in the home, in the church, in other organizations whose influence is religious though not professedly such, in the school, or in the individual's own personal religious experience and conduct of life. Any and all influences which have contributed to the consistent endeavor to live the good life may be classed as 'religious training.' Belief signifies sincere conviction. Religious belief signifies sincere conviction as to the supreme worth of that to which one gives his supreme allegiance."*

The next Director of Selective Service, Major General Lewis B. Hershey issued an opinion contained in a memorandum to the Department of Justice dated March 5, 1942, in which he took a very different view from that of his predecessor. General Hershey ruled that a conscientious objector could not qualify for exemption unless he believed in "some source of all existence which is divine because it is the source of all things."*

* Quoted in "The Conscientious Objector" published by the National Service Board for Religious Objectors, Washington, D. C., June, 1944.

More recently General Hershey reiterated this view in his report "Selective Service in War Time" (United States Government Printing Office 1943, p. 258) in which he states that the construction of the law which has prevailed in deciding Presidential appeals, a responsibility entrusted to him, is that the statute requires belief in "a Deity or a power above and beyond the human."

Selective Service agencies have therefore been called upon to choose between conflicting precedents. On the one hand the only appellate court which previously passed upon the question repeatedly held that the "religious training and belief" required by the statute does not necessarily include belief in a deity, but may be based upon "response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse" (*United States* v. *Kauten, supra*). On the other hand, the Director of Selective Service in deciding Presidential appeals construes the statute as requiring belief in deity. It would be difficult for a draft board or hearing officer to decide which of these precedents is controlling. While the Federal courts are superior to administrative agencies, including all Selective Service agencies, it is seldom that a conscientious objector is able to obtain review in the courts and in practice General Hershey, who decides Presidential appeals within the Selective Service system* is usually the court of last resort.

The picture is further complicated by the fact that another department of the Federal Government has adopted a different construction from that of the Director of Selective Service. The Department of Justice issued a

* Executive Order 8619, 5 Fed. Reg. 5256.

memorandum to wardens of Federal prisons dated April 15, 1944, instructing draft boards connected with the prisons in reclassifying conscientious objectors to follow the rule of the *Kauten* and *Phillips* decisions.

A conflict therefore exists among the agencies which jointly deal with classification of conscientious objectors, since under the Selective Service Regulations appeals in cases involving conscientious objection are the subject of investigation and hearing by the Department of Justice, but may be finally determined by the Director of Selective Service on Presidential appeal (See Selective Service regulations, Secs. 627.5, 628.1-628.7, Executive Order 8619, 5 Fed. Reg. 5256).

Now that the Circuit Court of Appeals in the Ninth Circuit has adopted a different rule from that of the Second Circuit, bewildered draft boards are called upon to choose between conflicting rulings both in the judicial and administrative branches of the government. Four independent and authoritative bodies have expressed views on opposite sides of this question: The Circuit Court of Appeals for the Ninth Circuit, the Circuit Court of Appeals for the Second Circuit, the Director of Selective Service and the Department of Justice. The contenders are now deadlocked in a 2-2 tie which can be broken only by this court allowing the writ as prayed for.

III

The court below has erroneously construed the exemption for conscientious objectors in the Selective Training and Service Act.

The decision of the court below turns upon the construction of statutory language which is uncertain and am-

biguous. Due to the complexity of human motives, no precise definition of conscientious objection could have been written into the statute. But Congress was apparently not content to employ the word "conscientious" standing alone as a sufficient designation of those persons who should be exempted from military service because of their scruples against war and added the limitation that such scruples must be held "by reason of religious training and belief." 50 U. S. C. App. §305 (g).

The decision below has attached a narrow and special meaning to the word "religious" as excluding all those who do not acknowledge the existence of a deity. It holds that no person who does not profess belief in a god is capable of religious impulse or motivation. Under this reasoning great sections of humanity would be classified as irreligious, including humanists, Buddhists, Hindus, members of Ethical Culture Societies and others attached to no formal religious organization. Such reasoning disregards the fact that every human being is capable of religious experience regardless of what he may believe about the nature and creation of the universe.

As was pointed out by Judge Augustus N. Hand in *U. S.* v. *Kauten,* 103 Fed. 2d 703, 708, Congress has taken into account that in the present skeptical generation the compelling voice of conscience, whether or not it be identified with the word "God", is generally regarded as a religious impulse. The construction of the court below is unrealistic in ignoring this fact and imputing to Congress a discrimination in matters of religion which was never intended and should not be inferred in the absence of specific evidence thereof.

Not only is the lower court's construction of the statute unrealistic and discriminatory but also it fails to provide

a reasonable test of conscientious objection. In writing this statute Congress was not attempting to extend privileges to certain religious groups and withhold these privileges from others, but it was seeking a definition of conscientious objection to war for which an exemption could properly be allowed. In searching for the Congressional intent behind the words "religious training and belief", we must therefore determine what reasonable relation those words may have to conscientious objection. No such reasonable relation can be found between conscientious objection to war and belief or disbelief in a deity. The latter is not a reasonable test by which the existence of the former can be determined. It rarely happens that a conscientious objector can identify his scruples against war with the will of God. There are, of course, some conscientious objectors whose religion is authoritarian in nature, and who would say that their opposition to war is derived from the commands of God or of the church as God's voice, but it cannot be supposed that most conscientious objectors could identify their beliefs with their theology in such a simple fashion. To test a man's conscience by his theological beliefs seems to us entirely unreasonable, and we cannot believe that Congress ever intended to lay down such a test.

On the contrary, as cogently reasoned by Judge Hand in the *Kauten* opinion, it seems obvious that Congress was attempting to distinguish between those objectors to war who, responding to the promptings of conscience, take their stand upon principle and those who are acting merely on the basis of personal expedience or political belief. In using the words "religious" and "conscientious" in the statute, it seems plain that Congress intended to draw a dividing line between those who act

on the compulsion of inward scruples and those who object to war merely on political opinion or out of personal selfishness or cowardice. Such a construction of the statute appears entirely reasonable while the construction adopted below has not even the semblance of reality.

IV

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
JULIEN CORNELL,
Counsel.

ERNEST ANGELL,
OSMOND K. FRAENKEL,
Of the New York Bar,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 538.

HERMAN BERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

PETITION FOR REHEARING ON CERTIORARI

A. L. WIRIN,
257 South Spring Street, Los Angeles 12,
Counsel for Petitioner.

The Myers Legal Press, Los Angeles. Phone VAndike 9007.

TABLE OF AUTHORITIES CITED

CASES

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UNITED STATES OF AMERICA,

PETITION FOR REHEARING ON CERTIORARI

This Court denied certiorari on December 23, 1946. A rehearing should be granted and the writ of certiorari issued, for the following reasons:

1. The decision of the Circuit Court below [R. 36], as to what constitutes "religious training and belief" within Section 5(g) of the Selective Training and Service Act, is in direct conflict with decisions of the Second Circuit Court of Appeals. The Court below expressly acknowledged that conflict, and frankly stated that it took "divergent views from those expressed in these cases" [R. 39]. Judge Denman stated that the decision of the majority "on this important question of law is in conflict with the decision of the Second Circuit in *United States v. Downer*, 135 F. (2d) 521 (C. C. A. 2, 1943). I am

in accord with all that the Second Circuit there says and holds" [R. 56].[1]

The Court below was of the view that "philosophy and morals and social policy without the concept of deity cannot be said to be religion." [R. 46.]

The Second Circuit Court of Appeals took the view that a deep and compelling "inner mentor" is the equivalent of a "religious impulse", and constitutes "religious training and belief," (*Kauten v. United States,* 133 F .(2d) 703, 708 (C. C. A. 2, 1943). No belief in a deity is required, in the definition by the Second Circuit Court of Appeals below.

2. The decision of the Circuit Court of Appeals below, is in direct conflict with the definition of "religious training and belief" heretofore given by the Selective Service System itself.

The Selective Service System, in effect, has ruled that the belief in, and the practice of, certain fundamental religious doctrines, as for example, "the Christian Doctrines of Reverence for Life", constitutes religion.[2]

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[1]The decisions of the Second Circuit Court referred to are:
United States v. Kauten, 133 F. (2d) 703 (C. C. A. 2, 1943);
United States v. Downer, 135 F. (2d) 521 (1943);
United States v. Badt, 141 F. (2d) 845 (C. C. A. 2, 1944).

Cf. also:
United States v. Badt, 152 F. (2d) 627 (C. C. A. 2, 1945), certiorari dismissed on motion of Solicitor General, 66 S. Ct. 979, 90 L. Ed. 912).

[2]See discussion in Petition for Writ of Certiorari in the instant case, p. 12; also in Brief of American Civil Liberties Union, filed herein, *Amicus Curiae,* p. 8.

Belief in a deity is not an indispensable element in the definition of the Selective Service System.

3. The Selective Service System erroneously rejected the petitioner's application for a classification as a conscientious objector, its rejection being solely because of the petitioner's lack of belief in a supernatural God.

Thus the first hearing officer, C. H. Hartke [Supp. Rec. 16-29], recommended the rejection of the petitioner's claim, because of a lack of showing that the petitioner in his activities had made an effort "to carry out the wishes of a divine providence." [Supp. Rec. 28.]

And the second hearing officer, J. R. Files [Supp. Rec. 29-34], seems to have taken essentially the same view when he concluded that "None of the deep-seated beliefs of Registrant, as they were related at the hearing had any relation to worship, none comport with the generally accepted meaning of religious belief." [Supp. Rec. 32.][3]

4. The evidence before the Selective Service System discloses affirmatively that the petitioner was a religious objector to war, within the definition of the phrase, "religious training and belief", by the Second Circuit Court of Appeals and by the Selective Service System itself.[4]

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[3]For further analysis of the evidence before the Selective Service agencies, see Reply Brief herein, pp. 4-8.

[4]See Petitioner's Reply Brief herein, p. 4, for a further discussion of this point.

The petitioner showed, both in belief and in act, a deep and compelling "inner mentor", which is the equivalent of a "religious impulse", and constitutes "religious training and belief" (*Kauten v. United States,* 133 F. (2d) 703, 708 (C. C. A. 2, 1943).)

He practiced the "The Christian Doctrines of Reverence for Life" within the definition of the Selective Service System.[5]

Conclusion.

In *Gibson v. United States,* October term, 1946, No. 23 (decided December 23, 1946), this Court took a further forward step in according adequate judicial review to the religious objector to war, aggrieved in the administration of the Selective Service System; by granting a rehearing in the instant case, this Court will take its first step toward a judicial liberalization of the concept of religion, in general, and the meaning of the phrase, "religious training and belief" in the Selective Training and Service Act, in particular.

A. L. WIRIN,

Counsel for Petitioner.

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[5]See Petition for Writ of Certiorari herein, p. 12, for text of Selective Service memorandum, defining "religious training and belief".

Certificate.

I certify that the within Petition for Rehearing is presented in good faith and not for delay.

A. L. WIRIN,

Counsel for Petitioner.